82-546

No.

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BETTY J. BIRCH,

Petitioner,

v.

JOHN H. LEHMAN, SECRETARY
OF THE UNITED STATES
DEPARTMENT OF NAVY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Is the thirty day statutory time period for filing a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 et seq., a jurisdictional prerequisite to suit by a federal employee or a statute of limitations subject to equitable tolling, waiver and estoppel?

II. 42 U.S.C. § 2000e-16(c) of Title VII of the Civil Rights Act of 1964, as amended, provides that a federal employee may file a civil action in the United States District Court within 30 days following receipt of "Notice of final action" by the Equal Employment Opportunity Commission ("EEOC").

A. Where the EEOC issues a letter denying relief to a federal employee and designates the letter as a

"final decision" but simultaneously advises the employee that she may petition EEOC for a rehearing of the decision, does EEOC's denial of a petition for rehearing, filed within the 30 day period for filing suit, constitute the "final action" within § 2000e-16(c), thus permitting a civil action to be filed within 30 days following the denial of the petition?

B. Does a petition for rehearing filed within the 30 day period for filing a civil action toll the time limit for filing a civil action until the petition is acted upon?

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I. Is the thirty day statutory time period for filing a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 et seq., a jurisdictional prerequisite to suit by a federal employee or a statute of limitations subject to equitable tolling, waiver and estoppel?

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"final decision" but simultaneously advises the employee that she may petition EEOC for a rehearing of the decision, does EEOC's denial of a petition for rehearing, filed within the 30 day period for filing suit, constitute the "final action" within § 2000e-16(c), thus permitting a civil action to be filed within 30 days following the denial of the petition?

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BETTY J. BIRCH,

Petitioner,

vs.

JOHN H. LEHMAN, Secretary of the Department of the Navy,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Betty, J. Birch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered May 5, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ___F.2d___, 28 FEP Cas. 1372. A copy appears in the Appendix at pp. A1-A6. The district court's opinion has not been published, but appears in the Appendix at pp. A8-A14.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1982. A timely petition for rehearing was filed on May 19, 1982 but was denied on June 16, 1982. (App. A7) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The case arises under the provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The petition

specifically involves § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3);

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

and § 717(c) and (d), 42 U.S.C. § 2000e-16(c) and (d):

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit

> referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, . . .an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

STATEMENT OF THE CASE.

Petitioner Betty J. Birch (hereafter "Ms. Birch") is a female citizen of the United States who was employed as a civilian by the United States Department of the Navy (hereafter "the Navy").

She worked as librarian at the Navy Regional Medical Center at Camp Lejeune, North Carolina. During her tenure there, she contends, the Navy denied her equal employment opportunities, harassed and intimidated her and, on December 14, 1976, discharged her because of her sex and in reprisal for her earlier complaints.

Ms. Birch pursued her administrative remedies within the Department of the Navy. In her complaint to the Navy, petitioner raised eight claims of discrimination, including the termination of her employment. On April 23, 1979, the Navy notified Ms. Birch that it accepted three of the issues for further investigation but that it dismissed five (including her termination) without ruling on the merits. Petitioner appealed the dismissal of the five claims

to the Equal Employment Opportunity Commission ("EEOC").

On September 3, 1980,[1/] the Office of Review and Appeals, a division within the EEOC, issued what it termed a "final decision" remanding four of the five issues to the Navy to consider on the merits. (See App. at A18-A26) As for the fifth issue, Ms. Birch's discriminatory termination, the Office of Review and Appeals dismissed her complaint, again not on the merits. The decision informed Ms. Birch that she could file a civil action in federal court within 30 days of her receipt of the decision. In addition, however, immediately following the Notice of her

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1/ The District Court specifically found that Ms. Birch received this decision on October 23, 1980. See App. at A9.

Right to File a Civil Action, the decision contained the following Notice:

NOTICE OF RIGHT TO REQUEST REOPENING

> The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:
>
> 1. New and material evidence is available that was not readily available when the previous decision was issued;
>
> 2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or
>
> 3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners . . .

(App. at A25-26).

On November 20, 1980, within thirty (30) days after receipt of this decision, plaintiff petitioned the full Commission to reopen and reconsider her discrimination complaint. In a decision dated May 18, 1981, the Commission issued a Denial of Request to Reopen. (See App. at A28) Ms. Birch received the Denial on May 21, 1981. The cover letter to the Denial stated, "Enclosed please find the final decision of the Equal Employment Opportunity Commission . . ." (emphasis added). (App. at A27) The Denial also stated that petitioner had "no further right of administrative appeal from a decision of this Commission . . ." (emphasis added) (App. at A31) Consequently, within thirty (30) days after her receipt of the Denial of her Petition for Reopening and Reconsideration,

on June 17, 1981, plaintiff filed this action.

The defendant moved to dismiss plaintiff's suit. On October 22, 1981 the district court entered Judgment granting defendant's motion to dismiss under Rule 12(b)(1), F.R.Civ.P., for want of subject matter jurisdiction. (App. at A15-A16) In its opinion, the district court reasoned that the Office of Review and Appeals decision dated September 3, 1980 was the final decision of the EEOC, and by implication, (1) the May 18, 1981 Denial of Request to Reopen was not a final decision upon receipt of which the plaintiff could, within 30 days, file suit; and (2) the 30 day time limitation could not be tolled since it was a jurisdictional limitation that "may not be disregarded by the Court." (App. at A8-A14)

The Fourth Circuit affirmed the dismissal for want of subject matter jurisdiction. (App. at A1-A6) Petitioner requested rehearing, but the request was denied. (App. at A7)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DECISION HOLDING THAT THE THIRTY DAY TIME PERIOD FOR FILING A CIVIL ACTION IS A JURISDICTIONAL PREREQUISITE TO MAINTENANCE OF A FEDERAL EMPLOYEE'S SUIT UNDER TITLE VII CONFLICTS WITH DECISIONS OF THIS COURT AND CREATES A CONFLICT IN THE CIRCUITS.

A. The Decision of the Court of Appeals for the Fourth Circuit conflicts with the Decisions of this Court in Zipes v. Trans-World Airlines and Mohasco Corp. v. Silver.

The district court dismissed this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), F.R. Civ.P., because the action was not filed within 30 days from what that court determined was the final agency action

within the meaning of § 717(c) of Title VII of the Civil Rights of 1964, as amended. 42 U.S.C. § 2000e-16(c). However, the holding that the 30-day time period stated in § 717(c) is a jurisdictional provision not subject to equitable tolling conflicts with the decisions of this Court in Zipes v. Trans-World Airlines, ___U.S.___, 102 S.Ct. 1127, 71 L.Ed.2d 234 (February 24, 1982) and Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

In Zipes, this Court held that the 180 day time limit for filing a charge with the EEOC contained in § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), is not jurisdictional but rather operates like a statute of limitations subject to waiver, estoppel and equitable tolling. Zipes, 71 L.Ed. at 243. The Court determined that:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. § 2000e-5(e) and (f) does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723, and Senator Case described its purpose as preventing the press of "stale" claims, 110 Cong. Rec. 7243, the end served by a statute of limitations.

71 L.Ed.2d at 243-44. (footnotes omitted). Thus the Zipes court contrasted two statutory provisions of Title VII: first, the provision setting forth time limits for filing a charge of discrimination; and second, the "entirely separate" provision granting district courts subject matter jurisdiction over discrimination suits.

The statutory structure described in Zipes as applicable to private employee suits is exactly paralleled in Title VII's provisions relating to federal employees. First, § 717(c), 42 U.S.C. § 2000e-16(c), sets out time limits for filing charges with a federal agency, filing an appeal to the EEOC from final agency action, and filing a civil action. Second, §§ 717(c) and (d), 42 U.S.C. §§ 2000e-16(c) and (d), incorporate the jurisdictional provision relating to private employees.[2/] In short, the provision granting district courts subject matter jurisdiction over Title VII suits, 42 U.S.C. §§ 2000e-5(f),

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2/ Thus, 42 U.S.C. §§ 2000e-16(c) and (d) provide that, within the specified time limits, an aggrieved employee or applicant "may file a civil action as provided in § 2000e-5 of this title . . . .," and that "the provisions of sections 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

is the same for both private and public employees. Accordingly, Zipes controls the case at hand because Zipes held that the provision granting jurisdiction to the district courts does not limit jurisdiction to those cases in which litigants have met the time limitations periods established in a separate, non-jurisdictional section of the statute.

Although the Fourth Circuit opinion was issued following this Court's ruling in Zipes, and although Zipes was called to the panel's attention,[3/] the panel opinion does not mention Zipes or indicate in any way that Zipes was considered. Its decision that the 30 day limit is jurisdictional is in conflict with Zipes.

3/ This case was briefed and argued before Zipes was issued. However, pursuant to F.R.App.P. Rule 29(j), counsel for petitioner brought Zipes to the panel's attention prior to oral argument in a letter dated March 29, 1982.

Similarly, by implication the panel opinion conflicts with Mohasco Corp. v. Silver, 447 U.S. 807 (1980). In Mohasco, a private Title VII plaintiff had failed to file a civil action within the 90 day time limit provided for private employees in 42 U.S.C. § 2000e-5(f)(1). Although this Court noted the defect, it did not dismiss for want of subject matter jurisdiction, as it would be bound to do if § 2000e-5(f)(1) were "jurisdictional." See Mitchell v. Maurer, 293 U.S. 237 (1934); City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973) (a court, whether trial or appellate, is obligated to inquire sua sponte into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it). Instead, the Court merely observed that the petitioner had not raised the respon-

dent's untimely filing as a defense. 447 U.S. at 811 n.9. Thus, Mohasco treated the analogous 90 day time limit for filing a private employee Title VII civil action as a statute of limitations subject to waiver, not as a jurisdictional prerequisite. The Zipes court approved the treatment by Mohasco of the 90 day filing period for private lawsuits as a statute of limitations.

The only possible distinction between the situation presented in Mohasco, and approved in Zipes, is that Mohasco dealt with the time limit for filing a civil action by private employees, while the case at hand concerns federal employees. However, as discussed earlier, the jurisdictional provision for both private and federal employees is the same: 42 U.S.C. § 2000e-5(f)(3). Moreover, this Court has recognized that Congress intended

federal employees to have the same access to federal courts as private employees. Chandler v. Roudebush, 425 U.S. 840 (1976). Indeed, Congress itself has evidenced its intention that the specific statutory provisions governing federal employees be interpreted in a manner parallel to and consistent with specific provisions involving private employees:

> Aggrieved [federal] employees or applicants [are to be accorded] the full rights available in the Courts as are granted to individuals in the private sector under Title VII.

S.Rep. No. 92-415, p. 16 (1971).

Therefore, since the Fourth Circuit's decision did not consider Zipes or Mohasco this Court should grant the petition for certiorari in order to achieve conformity with those decisions.

B. A Possible Conflict Exists Between This Court's Decisions in Zipes and Mohasco, and Brown v. GSA.

A further reason to grant certiorari is that there is a possible conflict between Zipes and Mohasco on the one hand, and Brown v. General Services Administration, 425 U.S. 820, 835 (1976), on the other. In Brown the Court affirmed the granting of a motion to dismiss because the federal employee did not file his civil action until 42 days after receiving notice of the final agency decision. In Brown the Court did not directly consider the question of whether timely filing was a jurisdictional prerequisite, nor were any equitable considerations presented. Consequently, the ruling seems to fall within the following comment in Zipes:

> Although our cases contain scattered references to the timely filing requirements as jurisdictional, the legal character of the requirement was not at issue in those cases, and as are more often in the same or other cases, we have referred to the provision as a limitations statute.

Zipes, 71 L.Ed.2d at 245.

Thus, while not dispositive of the issue here, Brown v. GSA adds considerable confusion to the case law and to the question of which Title VII time limits are covered by the holding of Zipes. The Court should therefore grant certiorari in order to resolve an apparent conflict between Zipes/Mohasco and Brown.

C. The Fourth Circuit's Holding That The 30 Day Limit of § 717(c) Is a Jurisdictional Prerequisite Creates a Conflict in the Circuits.

Following Zipes, every circuit except The Fourth that has considered the issue has concluded that meeting the various

time periods established in Title VII is not a jurisdictional prerequisite to suit. Since the Fourth Circuit decision dismissing this action is therefore in conflict with the decisions of other courts of appeals, this Court should grant certiorari in order to resolve the conflict.

In Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982), the Eleventh Circuit relied on Zipes to hold that the 30 day limit of § 717(c) is not jurisdictional but is subject to equitable tolling. In so holding, the court overruled Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir. 1977), cert. denied, 434 U.S. 985 (1977), stating, "The District Court relied on the former 5th Cir. holding in Eastdale [sic] v. Tennessee Valley Authority

[cite omitted] in ruling that § 2000e-16(c) was jurisdictional. That holding is no longer good law. Zipes v. Trans-World Airlines [citation omitted] . . ." Id. at 862. The Fourth Circuit decision here creates a conflict with the Eleventh Circuit's decision in Milam.

In the parallel context of a Title VII civil action filed by a non-federal employee, the Fifth and the District of Columbia circuits have both held that Zipes requires the conclusion that the applicable 90 day time limit of § 706(f)(1) is also not jurisdictional but is in the nature of a statute of limitations. See Whatley v. Board of Education, 673 F.2d 873, 879 n.5 (5th Cir. 1982); Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982).

The Fourth Circuit's decision in this case creates a conflict in the circuits concerning whether these related time periods for filing suit are jurisdictional prerequisites to suit. The Fourth Circuit decision also creates a conflict in the circuits over the proper interpretation of Zipes. Accordingly, this Court should grant certiorari to resolve these conflicts.[4/]

4/ Prior to Zipes, several circuits had reached opposite conclusions on the question of whether timely commencement of a civil action was a jurisdictional prerequisite to suit. Compare Allen v. United States, 542 F.2d 76 (3rd Cir. 1976) (consistently referring to § 717(c)'s 30 day time limit as a statute of limitations); Wiggins v. United States Postal Service, 653 F.2d 219 (5th Cir. 1981) (applying equitable principals to allow Wiggins, whose 30 days had long since passed, to file a timely action under § 717 without discussion of whether § 717(c)'s time limit is jurisdictional); Sessions v. Rusk State Hospital, 648 F.2d 1066, 1069 (5th Cir. 1981) (90 day time limit for suit against private party not

(fn.4 continued on next page)

II. THE FOURTH CIRCUIT'S DETERMINATION THAT THE EEOC'S DENIAL OF THE PETITION TO RECONSIDER DOES NOT CONSTITUTE FINAL AGENCY ACTION WITHIN THE MEANING OF SECTION 717(c) CONFLICTS WITH DECISIONS OF THIS COURT AND CREATES A CONFLICT IN THE CIRCUITS.

The Fourth Circuit held in this case that the EEOC's denial of petitioner's request for reconsideration by the full Commission of the Appeals & Review Board's decision does not constitute "final action"

(fn.4 continued from previous page)

a jurisdictional requirement); and Fox v. Eaton Corp., 615 F.2d 716, 718 & n.4 (6th Cir. 1980), cert. denied, 450 U.S. 935 (1981) with Gaballah v. Johnson, 629 F.2d 1191, 1198-99 & n.11 (7th Cir. 1980) (court considered late filing sua sponte and dismissed the claim for lack of subject matter jurisdiction) and Mahroom v. Hook, 563 F.2d 1369, 1374 (9th Cir. 1977). Both the Second and Tenth Circuits have left open for later decision the question of the availability of equitable tolling of the 90 day time limit for filing civil Title VII actions under § 706. See Ste.Marie v. Eastern R. Assn, 650 F.2d 395, 401 (2nd Cir. 1981); Cotrell v. Newspaper Agency Corp., 590 F.2d 836 (10th Cir. 1979). Thus, the pre-Zipes as well as the post-Zipes circuit cases are in conflict over whether the time limits for filing Title VII suits are jurisdictional prerequisites.

within the meaning of § 717(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c). The panel's decision conflicts with numerous decisions of this Court and other circuits holding that an administrative agency's denial of a timely petition for reconsideration is a "final action" within the meaning of analogous administrative schemes.

In American Farm Lines v. Black Ball Freight, 397 U.S. 532, 541, 25 L.Ed.2d 547 (1970) (holding that Interstate Commerce Commission has power to grant rehearing, even while the same case is pending in the district court) the Supreme Court ruled that:

> Unless Congress provides otherwise, '[w]here a motion for rehearing is in fact filed there is no final [agency] action until the rehearing is denied.'

American Farm Lines thus expressly contradicts the panel's ruling in the instant case that the EEOC's denial of plaintiff's petition for reconsideration was not a final action within the meaning of 42 U.S.C. § 2000e-16(c).

American Farm Lines relied on Outland v. Civil Aeronautics Board, 284 F.2d 224 (D.C. Cir. 1960). In Outland, Chief Justice (then Circuit Judge) Burger held that "when a motion for rehearing [of a final Agency action] is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the [Agency]." 284 F.2d at 228. Chief Justice Burger explained the circuit's ruling, made in the specific context of the Civil Aeronautics Board, as follows:

> The legislative history of 5 U.S. C.A. § 1009(c) indicates that it was adopted to achieve harmony with the holding in Levers v. Anderson, 1945, 326 U.S. 219, 66 S.Ct. 72, 90 L.Ed. 26 to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied . . . Section 1009(c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in such a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon.

284 F.2d at 227-228 (Emphasis added.)

Following Outland, the Supreme Court restated the general rule as "an administrative order is not 'final,' for the

purpose of judicial review, until outstanding petitions for reconsideration have been disposed of." Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 326 (1961) (Emphasis deleted.)[5/]

The Courts of Appeals have similarly adopted the reasoning of Outland. In B.J. McAdams, 551 F.2d 1112 (8th Cir. 1977), for example, the Eighth Circuit construed a statutory provision strikingly similar to the statute at hand:

5/ The dissent in Delta Airlines was even more emphatic: "Under every relevant reported decision, save one to be later noted, a timely motion for reconsideration, being an authorized and appropriate step in the proceeding, . . . prevents the 'proposed decision'--which, at that stage, is all it is--from becoming 'final.'" 367 U.S. at 339-41. (citations omitted). The single exception to "every reported decision" was Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 205 F.2d 449 (9th Cir. 1953), which was subsequently overruled by Samuel B. Franklin & Co. v. Securities and Exchange Commission, 290 F.2d 725 (9th Cir. 1961).

> On the entry of a final order reviewable under this chapter, the Agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within sixty days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

28 U.S.C. § 2344. 551 F.2d at 1114.

In B.J. McAdams, the plaintiff had received a "final order" from the Interstate Commerce Commission. Within sixty days of the entry of the order, the plaintiff petitioned the ICC for reconsideration. The petition was denied. Thereupon the plaintiff filed a petition requesting the ICC to find that the proceeding was one involving an issue of General Transportation Importance (GTI). At issue was whether the denial of a GTI petition constituted a "final order" within the meaning of Section 2344. The Eighth Circuit held that the filing of the GTI petition within 60 days of the

denial of the petition for reconsideration constituted a "final order," explaining its rationale as follows:

> Even though the filing of a GTI is discretionary and not required to exhaust administrative remedies, definite policy reasons reflect that judicial review should be postponed until a pending GTI petition has been ruled upon . . . Otherwise, parties would be required to file pro forma protective petitions for judicial review while GTI petitions are pending. The Court and the Agency would then possess simultaneous jurisdiction, creating the attendant possibility that Agency action on the GTI petition might render judicial review completely unnecessary. Moreover, denial of judicial review in the instant case would attribute prejudicial delay to the petitioner's effort in seeking discretionary Agency review. It is in the interest of judicial economy and agency responsibility to allow the Commission to reconsider its orders through a GTI proceeding, rather than to compel an applicant to invoke immediate judicial review.

551 F.2d at 1114-1115.

The Fourth Circuit's holding that the denial of a timely petition for reconsideration is not "final" agency action

therefore conflicts with decisions of this Court and other courts of appeal. Accordingly, this Court should grant certiorari to resolve the conflict.

III. THE FOURTH CIRCUIT'S CONCLUSION THAT A TIMELY FILING OF A PETITION FOR RECONSIDERATION DOES NOT TOLL THE 30 DAY PERIOD TO FILE A CIVIL ACTION UNDER SECTION 717(c) OF THE ACT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS CONSTRUING ANALOGOUS STATUTES.

The Fourth Circuit held that the 30 day time period for filing suit following receipt of the Appeals & Review Board's decision was a "jurisdictional" limitation not subject to equitable tolling. Accordingly, the circuit's decision rejected petitioner's contention that the timely filing of a petition for reconsideration tolled the time within which a civil action must be brought. The Fourth Circuit's decision places it in direct

conflict with decisions of other courts of appeal holding that time limits for seeking judicial review of final agency action operate as statutes of limitation and, further, that the filing of a timely petition for reconsideration tolls the statute.[6/] Consequently, this Court should grant certiorari to resolve the conflict.

In Samuel B. Franklin & Co. v. SEC, 290 F.2d 719, 725 (9th Cir. 1961), cert. denied, 368 U.S. 889 (1961), the Ninth Circuit carefully articulated a position contrary to the panel decision in the

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6/ The panel decision also conflicts with Sperling v. United States, 10 E.P.D. ¶10,517 (D.N.J. 1975) (holding that a complaint was timely filed if filed within 30 days after the Civil Service Commission (predecessor to the EEOC) dismissed a timely petition to reopen and reconsider).

instant case:

> the legislative history of [the predecessor to the Administrative Procedures Act] convinces us that that section was intended to mean only that it was not necessary to file a petition for rehearing in order to be eligible to obtain judicial review. We now hold that the timely filing of a petition for Agency reconsideration does toll the thirty-day period for appeal to this court and that an appeal taken within sixty days from the termination of the petition for reconsideration by the Agency is timely.

209 F.2d at 725. See also Lloyd v. U.S. Department of Labor, 637 F.2d 1267, 1274 (9th Cir. 1980) (holding that under 19 U.S.C. § 2322(a), which provides for judicial review within sixty days after notice of final determination, "administrative reconsideration tolls the time until the reconsideration is decided whence the 60 day period runs."); Tiger International, Inc. v. Civil Aeronautics Board, 554 F.2d 926, 931 n.10

(9th Cir. 1977) (in a ruling dealing with 49 U.S.C. § 1486(a), the Court held that "when a motion for rehearing or reconsideration of an [administrative] order is made in the proceeding before the CAB, time for filing the petition to review that order does not begin to run until the CAB acts on the motion").

The Ninth Circuit has been joined in the view that the filing of a timely petition for reconsideration tolls the statutory time for filing a civil action by the District of Columbia Circuit, Pennsylvania v. ICC, 590 F.2d 1187, 1192-96 (D.C.Cir. 1978); Montship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C.Cir. 1961) (holding that the provision of 5 U.S.C.A. § 1034, which specifies a sixty day period in which a party aggrieved by a final order of the Maritime

Board may seek judicial review, permits the sixty-day period to begin after the Board has acted upon a motion for reconsideration); the Second Circuit, State of New York v. United States, 568 F.2d 887, 892-93 (2nd Cir. 1977) (holding that where the agency denied a petition for reconsideration for 3 out of 4 interrelated decisions, the time for judicial review of the decisions did not run until disposition of the pending reconsideration hearing); the Fifth Circuit, Ecee, Inc. v. Federal Energy Regulatory Commission, 611 F.2d 554, 555 (5th Cir. 1980); and the Eighth Circuit, B.J. McAdams, Inc. v. ICC, 551 F.2d 1112 (8th Cir. 1977). Each of these decisions places other circuit courts in conflict with the Fourth Circuit on the question of whether the statutory time periods for

seeking judicial review of administrative decisions are tolled by the timely filing of a petition for reconsideration. Accordingly, Supreme Court review is necessary to resolve the conflict in the courts of appeal.

Arguably, the cases relied upon by petitioner might be distinguished on the basis that these decisions deal with the statutory time for filing for judicial review, rather than the time for filing a lawsuit. However, this difference has no legal significance for the purposes of the present case. Plaintiff relies on these cases for their interpretation of what constitutes "final" agency action, and for the effect ascribed to the filing of a petition for reconsideration of the agency's action. Petitioner contends

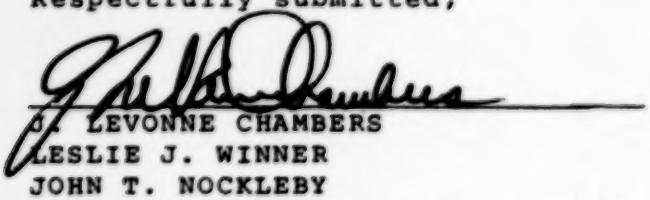
that there is no reason that the words "final action" in Title VII, 42 U.S.C. § 2000e-16(c), should be interpreted differently than courts have interpreted the words "final action" in these other statutes.

Since the Fourth Circuit's decision--holding the 30 day limit to be jurisdictional, and therefore not subject to tolling by the timely filing of a petition for agency reconsideration--conflicts both with decisions of this Court and with decisions of other circuits interpreting similarly-worded statutes, this Court should grant certiorari to resolve the conflicting interpretations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Fourth Circuit Court of Appeals and the judgment should be reversed.

Respectfully submitted,



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